Office - Supreme Court, U. S.
FILED
SEP 23 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 294

MYRA PAGE WIREN,

Petitioner,

against

SHUBERT THEATRE CORPORATION, *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONER.

OSCAR B. WIREN,
Attorney for Petitioner.

INDEX

PAGE

1—With respect to connection of Mr. Albert D. Lasker with respondent Paramount, and the disqualification of Judge Manton 1

2—As to the argument of respondents and the statement of the Circuit Court of Appeals in its decision on this motion about Paramount being in reorganization during a part of the period in question, the facts are as follows 5

3—With respect to Point II of the brief of respondent Paramount, contending that there is no important question of federal law involved, and that the Circuit Court of Appeals has not departed from the accepted course of judicial proceedings 6

4—With respect to the Statement of counsel for respondents Shubert, in Point I of his brief, that petitioner has failed to comply with Rule 12 of this Court 7

5—With respect to respondents' contention that petitioner is guilty of laches 7

6—With respect to the contention of respondent Paramount that petitioner is enjoined 8

7—With respect to the respondents' statements as to the facts of the plagiarism suit 9

TABLE OF CASES

	PAGE
Berger v. *United States*, 255 U. S. 22	3,4
Borough of Hasbrouck, N. J. v. *Agrios*, 10 Fed. Supp. 371	8
Case v. *Hoffman*, 100 Wis. 314	6
Chafin v. *U. S.*, 5 Fed. (2nd) 592	7
Davis v. *Seaward*, 85 Misc. 210, affd. 171 A. D. 963	6
Duryea v. *Traphagen*, 84 N. Y. 652	6
In re Honolulu Cons. Oil Co., 243 Fed. 348	4
Long v. *Stites*, 63 Fed. (2nd) 855	4
People v. *Connor*, 142 N. Y. 130	6
People vs. *Whitbridge as Receiver*, 144 App. Div. 493	3
Reg. v. *Cheltenham* (1841) 1 Q. B. 467	6
Reg. v. *Justices of Hertfordshire* (1845) 6 Q. B. 753	6
Regina v. *Henley* (1892) 1 Q. B. 504	6
Seaward v. *Tasker*, 143 N. Y. S. 257	6

STATUTES.

Judicial Code:	
Section 21 (36 Stat. at L. 1090, Chap. 231 U. S. C. Title 28, Section 25)	3,7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 294

MYRA PAGE WIREN,
Petitioner,
against
SHUBERT THEATRE CORPORATION, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONER

Because of incorrect statements as to the facts and inapplicable references to law in the briefs of respondents, this reply brief is necessary.

1

With respect to the connection of Mr. Albert D. Lasker with respondent Paramount, and the disqualification of Judge Manton.

Counsel for the respondents Shubert states that Mr. Lasker's sole relation to Paramount was "as the owner of a few shares of common stock of Paramount", and respondent Paramount quotes the Circuit Court of Appeals' statement that "Mr. Lasker's interest in Paramount was too remote to implicate Judge Manton".

It is admitted by Paramount that during the entire period in question and for several years thereafter, Mr. Lasker had the handling of all of the advertising business of the gigantic Paramount Corporation with its numerous

large subsidiary corporations of various kinds (R. p. 25); it is not denied that his great chain of Chicago theatres had been taken over and incorporated into Paramount (R. fol. 20); he had been made a director of Paramount and continued as such until January 17, 1933 (R. p. 32), just before the institution of the bankruptcy proceedings of the company on March 14, 1933 (R. p. 29); the New York Times financial sheet reported that Mr. Lasker, in company with Mr. Hertz, who also was a director of Paramount and Mr. Lasker's business associate, was buying heavily into Paramount (R. fol. 20).

With respect to the so-called 33 shares, petitioner claims on information that Mr. Lasker held a great deal of the stock of Paramount in the names of nominees or associates, just as his loan of $250,000 to Judge Manton was not in his own name but in the name of one of his companies, and Paramount admits that it has refused to allow petitioner to examine its stock lists (R. p. 50), the very lists from which they say that they obtained their information, although there could be no reason for their refusal if it were not that such an examination would disclose stock held by Mr. Lasker in the names of nominees or associates.

It is submitted that the 33 shares, referred to in the briefs of respondents Shubert and Paramount, were not by any means Mr. Lasker's only relationship with Paramount, and that his connection with and interest in Paramount was very far from remote.

When a man in Mr. Lasker's connection with Paramount and as deeply interested in the Corporation and its subsidiary corporations as Mr. Lasker, loaned a quarter of a million dollars to Judge Manton and pressed Judge Manton for payment at the very time that this case against Paramount was pending before Judge Manton, as testified to by Mr. Lasker, (R. p. 5) and Judge Manton was unable to pay it, as was testified (R. p. 5) and then Judge Manton decided this case, involving one of the most successful plays

and a motion picture which made a profit of several million dollars, in favor of Paramount, and thereafter Judge Manton was not pressed for payment, as was testified to (R. p. 5), and Judge Manton has never paid any part of it or any interest thereon, (R. p. 5) and did not list it among his debts (R. p. 5); it is submitted that the financial consideration which Judge Manton thereby received was just as "real, certain, demonstrable and capable of concise proof" as though the evidence were that Judge Manton was paid cash for his decision and that as said by this Court in *Berger* v. *United States*, 255 U. S. 22, "he had no right or power to preside as judge".

The cases cited under Point II of the brief of respondents Shubert, as bearing upon the question of disqualification and as to when such disqualification should be challenged, do not support his contention. Those cases deal with the situation provided for under section 21 of the Judicial Code which provided for the filing of an affidavit before trial with the judge who is to preside at the trial. In *People* vs. *Whitbridge as Receiver*, 144 App. Div. 493, an affidavit was filed with the judge at the time of the trial citing his ownership of stock in the Union Railway Company of New York, which was in receivership. The court held that the action was against the receiver and not against the railway company, saying "Although Mr. Whitbridge is sued as receiver, it is manifest that the acts or omissions for which it is sought to recover penalties were his personal acts or omissions, and not those of the railway company, and if judgment had gone against him, it would have been one against him personally and not one against him *as* receiver or against the corporation." Furthermore, counsel for Shubert has not fully quoted the court in saying that the court said merely "the interest requisite for disqualification must be real", because what the court said was: "The interest which will disqualify a judge to sit in a cause *need not be large*" (italics ours) "but it must be real".

In *Berger* v. *United States* (supra), cited by counsel for Shubert the affidavit filed under Section 21 of the Judicial Code charged Judge Landis, who was to preside at the trial, with bias and prejudice, stating that Judge Landis had made remarks concerning the defendants who had been indicted, and Mr. Justice McKenna held that the affidavit of prejudice was sufficient to invoke the operation of the act and that Judge Landis had a lawful right to pass upon the sufficiency of the affidavit, but that he had no right or power to preside as judge on the trial of defendants.

In re Honolulu Cons. Oil Co., 243 Fed. 348, the judge held a little stock in two of the many oil companies which were being sued by the United States for an accounting. He disqualified himself voluntarily on three occasions and then sold the stock for $16.90 and felt that thereafter he was not disqualified; but the Court held that in view of the fact that he had certain stockholder's liabilities, he was "sufficiently related to the litigation to impel the conclusion that he is concerned in interests and therefore should not sit," and a writ of mandamus was issued.

Long v. *Stites*, 63 Fed. (2nd) 855, was a suit by stockholders for maladministration against trustees under a trust agreement by which the National Bank of Kentucky and the Louisville Trust Company had been combined and the trustees had promoted a new bank called "The Banco Kentucky," and plaintiffs charged them with maladministration. On the trial the plaintiffs asked the district judge to disqualify himself upon the ground that he and his wife were depositors (in amounts not shown) in the National Bank of Kentucky. The court said, on page 858: "Neither the bank nor its receiver were parties, and the plaintiffs' action involved no issues as between either of them and the plaintiffs". Petitioner submits that this case is not at all in point with the present case.

2

As to the argument of respondents and the statement of the Circuit Court of Appeals in its decision on this motion about Paramount being in reorganization during a part of the period in question, the facts are as follows:

The large investment of Paramount in the purchase of the talking motion picture rights to the play and the preparations to produce the picture (R. pp. 18-25) were prior to the filing of Paramount's voluntary petition in bankruptcy in March, 1933 (R. p. 29). The production of the picture was held up (R. pp. 19-23) until the decision of the District Court dismissing the case without a trial in August, 1933 (R. p. 17) but the production of the picture was completed at a cost of half a million (R. p. 23) prior to the decision of Judge Manton on May 21, 1934, and prior to the filing by Paramount of its petition for a reorganization on June 7, 1934, the picture being released in the United States in the spring of 1934 (R. p. 24). The Closing Time of the reorganization when the Trustees turned back the assets to the debtor was July 1, 1935 (R. p. 30). The picture was exhibited thereafter throughout the United States and Europe for several years making profits of several million dollars.

Mr. Lasker was a director of Paramount from 1931 to just before the filing of the voluntary petition in bankruptcy in 1933 (R. p. 38) and handled all of the advertising business of Paramount and its many subsidiary corporations continuously from 1932 to 1937 (R. p. 25).

Thus it is not true, as the respondents would have the Court believe, that the Trustees were in charge throughout the period in question. The fact is that the greater part of the investment by Paramount and practically all of the earnings on the picture took place when the Trustees

were not in charge and that they took place while Mr. Lasker was so connected with and deeply interested financially in the affairs of Paramount.

3

With respect to Point II of the brief of respondent Paramount, contending that there is no important question of federal law involved, and that the Circuit Court of Appeals has not departed from the accepted course of judicial proceedings.

It is submitted that the question as to what constitutes the disqualification of the presiding judge of a United States Circuit Court of Appeals is a question of federal law and one of great importance.

With respect to the second part of the point, which contends that the Circuit Court of Appeals has not departed from the accepted course of judicial proceedings, it has been held, *even in many cases where there was merely technical disqualification and there had been no actual corrupt participation in the decision,* that no decree was rendered by a duly constituted and completely disinterested court and that, in legal effect, no hearing was had by the plaintiff, and that therefore the decrees were void and a nullity. (See *Case* v. *Hoffman,* 100 Wis. 314; *People* v. *Connor,* 142 N. Y. 130; *Duryea* v. *Traphagen,* 84 N. Y. 652; *Seaward* v. *Tasker,* 143 N. Y. S. 257; *Davis* v. *Seaward,* 85 Misc. 210, affd. 171 A. D. 963; *Regina* v. *Henley* (1892) 1 Q. B. 504; *Reg.* v. *Justices of Hertfordshire* (1845) 6 Q. B. 753; *Reg.* v. *Cheltenham* (1841) 1 Q. B. 467).

4

With respect to the statement of counsel for respondents Shubert, in Point I of his brief, that petitioner has failed to comply with Rule 12 of this Court.

Rule 12 deals solely with appeals by application to and allowance by a justice and not to a petition for certiorari. Counsel for respondent treats it as though the amendments of the act of Congress of 1928 abolishing the writ of error and extending the right of appeal in equity cases included a proceeding of this kind.

5

With respect to respondents' contention that petitioner is guilty of laches.

Petitioner submits that the affidavits submitted by her counsel and set forth in the record show that she was practically at death's door with heart disease during all of that time and that even up to last Fall, she was very seriously ill and that her illness required the attention of her brother, who is her counsel, and that he could not bring these proceedings sooner. (R. pp. 3, 4, 46). Counsel for respondent Shubert makes the statement that Judge Manton's judicial conduct had been referred to in the press prior to his indictment. Surely counsel does not mean to urge that proceedings should have been taken upon such mere rumors.

The case of *Chafin* v. *U. S.*, 5 Fed. (2nd) 592, cited by the counsel for Shuberts, in support of his statement that "the challenge must be made at the first opportunity after the discovery of the facts," is not in point as it deals with an affidavit filed under Section 21 of the Judicial Code,

after indictment and before trial, and the court merely construed the terms of that section which provide that when the indictment is found 10 days before the term begins the affidavit must be filed ten days before the beginning of the term, or good cause shown, for "the public protection against unnecessary surprise, delay and expense": also the case of *Borough of Hasbrouck, N. J.* v. *Agrios,* 10 Fed. Supp. 371 cited by counsel for Shuberts on this is not in point. It was a suit to recover damages for breach of contract to build a sewer, and the court said: "The proper time to bring the facts concerning disqualification before the judge is as early in the action as the objecting party has knowledge of the facts."

Counsel for respondent Shubert quotes the Circuit Court of Appeals as saying in its decision on this motion that the delay is "not adequately explained", whereas what the Circuit Court of Appeals said is: "The delay in making this motion is not adequately explained. *But assuming that this defect could be cured by a further affidavit*" (R. p. 2), showing, as petitioner submits, that the Circuit Court considered that the delay could be explained and waived.

6

With respect to the contention of respondent Paramount that petitioner is enjoined.

When the attorney for Paramount raised this point on the hearing of the motion, petitioner submitted a copy of the order of Judge Coxe in the Paramount proceedings modifying the restraining order and providing that petitioner's action should "*continue to final* judgment" (R. p. 47), and a similar order by Judge Caffey in the Shubert bankruptcy proceedings (R. p. 47).

The order of June 16, 1934, mentioned by Paramount, was issued *after* the decision of Judge Manton on May 21, 1934.

The decision of the Circuit Court of Appeals on this motion does not mention this contention of Paramount and no similar contention is made on the part of the Shuberts, although similar orders were signed in that proceeding, but counsel for Paramount claims that petitioner should have filed a claim prior to June 17, 1935.

It is submitted that Judge Manton dismissed the appeal of petitioner on May 21, 1934 and petitioner's application to this court for a writ of certiorari was finally denied on November 5, 1934, and it is submitted that petitioner could not file a claim. There was no intimation at that time by anyone that Judge Manton was guilty of judicial misconduct, and what petitioner seeks here is the vacation of the decree of the Circuit Court of Appeals of May 21, 1934, and the restoration of the case to its status prior to that date.

With respect to the respondents' statements as to the facts of the plagiarism suit.

On the hearing of this motion in the Circuit Court of Appeals respondents insisted upon arguing the facts of the plagiarism suit, counsel for Paramount serving a 34 page affidavit dealing very largely with those facts, and because of that petitioner submitted the story of the two plays told as one, showing the complete identity of the three acts of the two plays from beginning to end, contained in the record.

It is submitted that the facts concerning the plagiarism suit did not pertain to this motion in the Circuit Court of Appeals and that the only issue was whether Judge Manton was disqualified.

All that petitioner is asking is an opportunity to present her appeal to a disinterested Court in order to show that the decision of the District Court was entirely contrary

to the facts of the case and to the law on all of the questions involved and be allowed a trial of her case which she has been trying to get for twelve years but thus far has been denied, whereby a great injustice was committed.

WHEREFORE petitioner respectfully asks that her petition be granted.

MYRA PAGE WIREN,
By OSCAR B. WIREN,
Attorney for Petitioner.